

121

2

No. 08-966

Supreme Court, U.S.
FILED
FEB 24 2009
OFFICE OF THE CLERK

**In The
Supreme Court of the United States**

OHIO MIDLAND, INC. and ROGER BARACK,
Petitioners,

v.

GORDON PROCTOR, Director, Ohio Department of
Transportation, and JIM SPAIN, Deputy Director,
District 11, Ohio Department of Transportation, and
NORFOLK SOUTHERN RAILWAY CO.,
Respondents.

*On Petition for Writ of Certiorari to the United
States Court of Appeals for the Sixth Circuit*

BRIEF IN OPPOSITION

M. CHARLES COLLINS (0065077)
JOHN T. LANDWEHR (0021711)
Counsel of Record
EASTMAN & SMITH LTD.
ONE SEAGATE, 24TH FLOOR
P.O. Box 10032
TOLEDO, OHIO 43699-0032
TELEPHONE: (419) 241-6000
FAX: (419) 247-1777

*Attorneys for Respondent
Norfolk Southern Railway Co.*

February 24, 2009

QUESTIONS PRESENTED

Petitioners pose the following Questions Presented:

1. Does a cause of action for a *per se* permanent physical taking of private property by government, without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution, accrue when government first temporarily takes the property, or when the owner is "reasonably on notice" the taking may be permanent, or when the taking actually becomes permanent and the owner knows or should know it is permanent?

2. Where Congress reserved to itself the authority to "alter, amend, or repeal" an act granting its consent to "construct, maintain and operate" a bridge over navigable waters of the United States and later delegated all of its reserved authority to an administrative agency of the executive branch, and where Congress further provided that any deviation from approved bridge plans is unlawful "unless the modification of such plans has previously been submitted to and received the approval of" the administrative agency, does adjudication of a private contract claim that the bridge must be removed require a prior determination of whether the bridge must be removed, by the administrative agency to which Congress delegated all of its reserved authority?

Respondent Norfolk Southern Railway Co. respectfully restates the Questions Presented as follows:

1. In applying the statute of limitations, what is the accrual point for a claim of alleged unlawful

government taking under the Fifth and Fourteenth Amendments to the U.S. Constitution?

2. Does adjudication of a private contract claim, alleging a duty by one party to remove the structure of a non-functioning bridge from the property of another, require a prior determination by the United States Coast Guard as to whether the bridge constitutes an unreasonable obstruction to navigable waters?

**PARTIES TO THE PROCEEDINGS BELOW
AND RULE 29.6 STATEMENT**

Plaintiffs-Appellants: Ohio Midland, Inc. and Roger Barack.

Defendants-Appellees: Gordon Proctor, Director, Ohio Department of Transportation; Jim Spain, Deputy Director, Section 11, Ohio Department of Transportation; Norfolk Southern Railway Co.¹

Norfolk Southern Railway Co. is a wholly-owned operating subsidiary of Norfolk Southern Corporation, which is a publicly-owned company.

¹ As noted by Petitioners in their Petition for Writ of Certiorari, other previous defendants in this action were Joe Manchin, Governor of West Virginia, the City of Benwood, West Virginia, and the Commandant of the United States Coast Guard. However, these defendants were not parties to the appeal because Petitioners have not appealed any orders applicable to them. The Commandant, however, is a "party to be served" under this Court's Rule 29.4(a), and has been served with a copy of this Brief in Opposition.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
RELEVANT STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	2
REASONS FOR DENYING THE PETITION	3
<p><i>A. There is no compelling reason for this Court to issue a writ of certiorari because Petitioners' takings claims are time-barred under any accrual analysis.</i></p>	
<p>1. Petitioners' takings claims are time-barred based upon the accrual analyses from the Sixth, Tenth, and First Circuits.</p>	3
<p>2. Petitioners' taking claims became "permanent" immediately upon the alleged taking, and such claims are likewise time-barred as held by the Federal Circuit.</p>	7

<i>B. There is no compelling reason for this Court to issue a writ of certiorari based upon Petitioners' question presented that addresses whether a prior determination by the United States Coast Guard is necessary in a matter involving a private contract claim.</i>	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES

<i>John R. Sand & Gravel Co. v. United States</i> , 457 F.3d 1345 (Fed. Cir. 2006)	7, 8
<i>Kuhnle Bros., Inc. v. County of Geauga</i> , 103 F.3d 516 (6th Cir. 1997)	4
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982)	8
<i>McIntyre v. Board of County Comm'rs</i> , 252 Fed. App. 240 (10 th Cir. 2007)	4
<i>Ruff v. Runyon</i> , 258 F.3d 498 (6 th Cir. 2001)	4
<i>Vistamar, Inc. v. Fagundo-Fagundo</i> , 430 F.3d 66 (1 st Cir. 2005)	4, 5

STATUTES

U.S. CONST. amend. V	1
U.S. CONST. amend. XIV	1

OTHER

GRESSMAN, ET AL., SUPREME COURT PRACTICE (9 th Ed. 2007)	2
--	---

RELEVANT STATUTORY PROVISIONS

Norfolk Southern Railway Co. respectfully submits the following additions to Petitioners' Relevant Statutory Provisions:

U.S. CONST. amend. V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. XIV, § 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

Norfolk Southern Railway Co. respectfully incorporates by reference the Factual Background

compiled by the United States Court of Appeals for the Sixth Circuit in the opinion below, included in the Petition for Writ of Certiorari at Appendix A, pp. 2a-10a. See GRESSMAN, ET AL., SUPREME COURT PRACTICE (9th Ed. 2007) 501 (“[T]he statement of the facts in the opinion below . . . will often be sufficient from respondent’s point of view”).

SUMMARY OF THE ARGUMENT

This Court should deny the petition for a writ of certiorari. No conflict exists among the circuit courts as to when a takings claim accrues and, even if such conflict existed, Petitioners’ claims are time-barred under any standard. Further, Petitioners’ takings claims became “permanent” at the time of the initial alleged taking, and the applicable statute of limitations expired long before Petitioners filed their complaint.

Additionally, Norfolk Southern Railway Co. (“Norfolk”) has been granted orders by both the district and appellate courts requiring Petitioners to remove the non-functioning bridge from Norfolk’s property, based upon a contractual requirement that Petitioners “ultimately remove” the bridge when it is no longer used to transport highway traffic. The bridge stopped carrying such traffic in 1991.

In 1998, the United States Coast Guard determined that the non-functioning bridge constituted an unreasonable obstruction to navigation and required Petitioners to provide plans to demolish the bridge. The Coast Guard remains in the process of conducting an investigation to confirm or disaffirm that initial determination - however, that determination will in no

way affect Norfolk's contractual right (and prior court orders) to have the bridge removed from Norfolk's property.

For these reasons, this Court should deny Petitioners' petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

A. There is no compelling reason for this Court to issue a writ of certiorari because Petitioners' takings claims are time-barred under any accrual analysis.

Petitioners first assert that this Court should accept certiorari because the circuits are allegedly divided over the point at which a takings claim accrues. Norfolk first responds that no such conflict exists. Further, even if a conflict existed, it would be irrelevant in the context of this case because, under any of the accrual points cited in Petitioners' brief, Petitioners' takings claims accrued and expired long before they filed their complaint.

1. Petitioners' takings claims are time-barred based upon the accrual analyses from the Sixth, Tenth, and First Circuits.

Petitioners argue that the Sixth Circuit "has fashioned a rule that a permanent physical taking claim accrues when a property owner is 'realistically on notice' that a physical taking may have become permanent." Pet. Writ Cert., p. 18. While Petitioners provide no citation of authority for this assertion, it appears that Petitioners are referring to the prior

decision issued in this matter by the Sixth Circuit. However, that is not the rule stated by that court.

The Sixth Circuit is clear as to when a takings claim accrues, and that law was appropriately applied by the lower courts. In its decision affirming the district court in this matter, the Sixth Circuit cited *Ruff v. Runyon*, 258 F.3d 498, 500 (6th Cir. 2001) for the premise that the statute of limitations for Petitioners' takings claims "begins to run under federal law 'when plaintiffs knew or should have known of the injury which forms the basis of their claims.'" Pet. Writ Cert., App. A, p. 12a. The court then continued, "In determining when the cause of action accrues in section 1983 actions, courts have looked to what event should have alerted the typical lay persons to protect his or her rights," citing *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997). *Id.*²

Petitioners compare the approach of the Sixth Circuit with that of the Tenth Circuit, which has determined that "the limitations period [for a takings claim] begins to run at the time of the taking." Pet. Writ Cert., p. 17, citing *McIntyre v. Board of County Comm'rs*, 252 Fed. App. 240, 246 (10th Cir. 2007). Petitioners contend this approach is also followed by the First Circuit. See *Vistamar, Inc. v. Fagundo-Fagundo*, 430 F.3d 66 (1st Cir. 2005).³

² Norfolk emphasizes that the district court likewise cited these exact same two cases when determining the point of accrual for Petitioners' takings claims. Pet. Writ Cert., App. E, p.78a.

³ Petitioners assert that the dissent in *Vistamar* would instead follow the accrual rule of the Federal Circuit. See Pet. Writ Cert.,

In presenting the approaches of these circuits, Petitioners cannot validly assert that they have been harmed by the Sixth Circuit's ruling. Indeed, the discovery rule approach of the Sixth Circuit (*e.g.*, applying a "knew or should have known" standard) is more accommodating for Petitioners than that of the First and Tenth Circuits, which flatly provide that the claim accrues upon the taking, with no apparent regard for the discovery date.

All parties (and the lower courts) agree that ODOT demolished the ramp in 1991, and it has never been rebuilt. See Pet. Writ Cert., p. 5 ("ODOT purchased the ramp and removed it, which suspended operation of the bridge") and pp. 41a and 84a (district court Opinions & Orders noting bridge ramp was demolished in 1991). Petitioners also allege that requests to ODOT to allow Petitioners the opportunity to rebuild the ramp have been either rejected or unanswered, and in 1998 the Coast Guard first informed them that the bridge was an unreasonable obstruction to navigation, requiring Petitioners to provide plans within 60 days to demolish the bridge. (*Id.* at p. 6)

Given this undisputed chronology of events, the Sixth Circuit applied the appropriate accrual standard and held that

[I]t is clear that Barack would have been on notice during the early 1990s that ODOT did

p. 18. However, *Vistamar* does not offer a dissenting opinion, and Norfolk is unable to determine the authority for Petitioners' assertion that the 1st Circuit has entertained in any way the view of the Federal Circuit on this issue.

not intend to rebuild the ramp. Moreover, Barack realistically was on notice that ODOT did not intend to allow him to build his own ramp sometime during the early 1990s, when ODOT is alleged to have repeatedly refused to grant Barack permission to build his own ramp, whether through an outright denial of permission or inaction on his request. *Even giving plaintiffs the benefit of the doubt, Barack was certainly on notice that there would be no new ramp in 1998, when ODOT was prepared to stand by and allow the bridge to be razed following the Coast Guard's demolition order. Consequently, the plaintiffs had reason to know of their injury in the early 1990s, and in 1998 at the latest, and the statute of limitations therefore accrued much longer than two years before plaintiffs commenced suit in 2005.*

Pet. Writ Cert., App. A, p. 12a-13a (emphasis added). Thus, the appellate court closely examined the history of events, and plainly determined that the statute of limitations for Petitioners' takings claims had expired long before filing. This Court should agree and deny Petitioners' writ.⁴

⁴ Norfolk emphasizes that Petitioners previously received hundreds and hundreds of thousands of dollars to cover the expenses associated with Petitioners' contractual requirement to demolish the bridge. (See Pet. Writ. Cert., App. A, pp. 3a - 4a.)

2. Petitioners' taking claims became "permanent" immediately upon the alleged taking, and such claims are likewise time-barred as held by the Federal Circuit.

Petitioners next assert that the Federal Circuit follows an accrual rule that a takings claim accrues only "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action" and claimant knew or should have known of the existence of such events. Pet. Writ Cert., p.18, citing *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345 (Fed. Cir. 2006). However, Petitioners then proceed to characterize this standard in Petitioners' own language. According to Petitioners, this standard can be restated as a "takings claim accrues when (1) a physical taking **actually** becomes permanent, and (2) the owner knew or has reason to know the taking has become permanent." Pet. Writ Cert., pp. 18-19 (emphasis in original).

Petitioners apparently seek to persuade this Court that the permanency of the alleged taking in this matter arose only after the Coast Guard issued its final agency decision on October 18, 2005, and Petitioners' claim would have first accrued at that point, within two years of their filing the complaint. *Id.* at pp. 19, 6. Petitioners therefore attempt to rely on the "permanent" aspect of their alleged takings claim in their effort to extend the limitations period. This Court should reject this argument.

Petitioners correctly note that this Court has provided no definition of "permanent" in the takings context, though this Court has recognized that,

because any government occupation can always possibly be abandoned at some future time, permanent cannot be given its ordinary meaning of forever. Pet. Writ Cert., p. 17, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). However, the permanency issue has been fully addressed by the Federal Circuit.

In *John R. Sand & Gravel*, that court specifically recognized that “permanent” requires a special definition in takings contexts:

In the context of physical takings ***permanent does not mean forever, or anything like it.*** A government occupation is permanent when the government’s intrusion is a substantial physical occupancy of private property. The government’s occupation may be permanent even if it is not exclusive, or continuous and uninterrupted.

457 F.3d at 1357 (emphasis added; internal quotations omitted.)

As they now attempt in this Court, Petitioners also tried to convince the Sixth Circuit Court of Appeals that the taking was not “permanent” until 2005 upon the Coast Guard Final Determination. However, the appellate court rejected that argument:

The plaintiffs seek to avoid this conclusion [e.g., that the taking claims are time-barred] by arguing that, because the ODOT defendants could theoretically have authorized the construction of a new ramp until the Coast Guard finally ordered the bridge’s demolition,

the plaintiffs' injury did not become permanent, and thus the statute of limitations did not begin to accrue, until October 2005. *This argument is unpersuasive. Assuming plaintiffs are correct that the statute of limitations did not begin to accrue until it became clear that their injury was permanent, the relevant inquiry is permanent versus temporary, not physical possibility versus impossibility.* On plaintiff's theory of taking, the time at which the deprivation became "permanent rather than temporary" is determined by ODOT, not by the Coast Guard's actions. After all, the plaintiffs' theory is that ODOT's refusal to build or allow construction of a new ramp has rendered the bridge economically valueless. Regardless of the Coast Guard's actions, the bridge is economically valueless on this theory as long as ODOT maintains its positions not to allow construction of a new ramp. Consequently, while it is easy to see how the Coast Guard's order to demolish the bridge renders the bridge's lack of value "permanent," the *plaintiffs' injury was "permanent rather than temporary" in the relevant sense when it was clear that ODOT would neither build nor allow construction of a new ramp.* As explained above, this occurred in 1998 at the latest.

Utilizing any of the accrual approaches cited by Petitioners, their takings claims must fail as time-barred. This Court should deny the petition for writ of certiorari.

B. There is no compelling reason for this Court to issue a writ of certiorari based upon Petitioners' question presented that addresses whether a prior determination by the United States Coast Guard is necessary in a matter involving a private contract claim.

Stated simply, the issue is this – Norfolk has obtained court orders, from both the district and appellate courts, requiring Petitioners to remove the non-functioning bridge from Norfolk's property, which removal is required under the contractual Lease Agreement between Norfolk and Petitioners. However, the Coast Guard is still conducting an investigation as to whether the non-functioning bridge constitutes an unreasonable obstruction to navigable waters. If so, it must be removed pursuant to the applicable federal law(s). If not, presumably, the Coast Guard will not require the bridge's demolition. However, in no event will the Coast Guard order that the bridge *must* remain standing.

Both courts below have reviewed this issue and determined that no conflict, interference, or even connection exists between the Coast Guard's future determination regarding the bridge's demolition and Norfolk's contractual right to now have the bridge removed from its property. These courts' respective, well-reasoned analyses refute fully Petitioners argument, and Norfolk accordingly reproduces these analyses *verbatim*. The district court held:

Barack's contractual duty under the Lease Agreement to "ultimately remove" the Bridge does not in any way depend on the

Coast Guard's determination of whether the Bridge structure is an unreasonable obstruction to navigable waters. ... The purpose of the Lease Agreement – to provide land to the lessee for its “highway and traction” Bridge – has been fulfilled. The Bridge has been non-functioning for years, and under the agreement “for the protection and safety of the property owned . . . as well as the protection and safety of the employees, patrons and licensees” of Norfolk, Barack must now remove it.

Pet. Writ Cert., App. B, pp. 33a-34a (emphasis added). In affirming the district court's ruling, the appellate court similarly held:

Because all parties agree that the plaintiffs have a contractual duty to remove the bridge once it can no longer be used as a bridge, it is fair to say—as the district court did—that this duty was triggered sometime in the sixteen years during which the bridge has been inoperable with no reasonable expectation of re-use. ***This duty in no way hinges on the actions of the Coast Guard.***

Pet. Writ Cert., App. A, p. 18a (emphasis added).

This Court should determine likewise and deny Petitioners' writ.

CONCLUSION

For all of the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

M. Charles Collins (0065077)
John T. Landwehr (0021711)
Eastman & Smith Ltd.
One SeaGate, 24th Floor
P. O. Box 10032
Toledo, Ohio 43699-0032
Telephone: (419) 241-6000
Fax: (419) 247-1777
Email: mccollins@eastmansmith.com
jtlandwehr@eastmansmith.com

Attorneys for Respondent
Norfolk Southern Railway Co.